

IN THE HIGH COURT JUDICATURE AT BOMBAY

O.O.C.J.

WRIT PETITION NO.378 OF 2009

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Shaunak H. Saitya ...Petitioner

v/s.

Union of India  
and ors. ...Respondents

...

Mr.Navroz Seervai, Senior Advocate with  
Mr.Rohan Rajadhyaksha, Mr.Sayeed Mulani i/b  
Mulani & Co. for the Petitioner.

Mr.Kiran Kandpile with Mr.D.A.Dubey for  
Respondent No.1.

Mr.Virag Tulzapurkar, Senior Advocate with  
Mr.Mayur Khandeparkar, Mr.D.D.Patel i/b Kanga  
& Co. for Respondent No.2.

...

CORAM: D.K.DESHMUKH &  
N.D.DESHPANDE, JJ.

DATED: 30<sup>th</sup> November, 2010

P.C.:

1. By this petition the Petitioner  
challenges the order dated 23<sup>rd</sup> December, 2008

passed by the Central Information Commission under the provisions of Right to Information Act, 2005 as also the order dated 22<sup>nd</sup> February, 2008 passed by the Central Public Information Officer of the Institute of Chartered Accountants of India under the same Act.

2. The Petitioner appeared for the Chartered Accountant final examination conducted by the Respondent No.2 in November, 2007. The result of that examination was declared in January, 2008. The Petitioner was dissatisfied with the result. Therefore, on 18-1-2008 he addressed an application under the Right to Information Act to the Public Information Officer of the Respondent No.2 seeking certain information in relation to the examination. In the present petition we are concerned with the

information sought under items Nos.3, 5 and 13. That Application was disposed of by order dated 22-2-2008. The information sought by the Petitioner against Items Nos.3, 5 & 13 was declined to be furnished. Therefore, an appeal was filed against that order before the Central Information Commission. The Central Information Commission disposed of the Appeal by order dated 23-12-2008. The Central Information Commission also declined to furnish information against the aforesaid items. Hence, petition has been filed challenging the aforesaid orders.

3. As observed above in the present petition we are concerned with the information sought by the Petitioner against Items Nos.3, 5 & 13. Items Nos.3, 5 & 13 read as under:

3. Instructions issued to the examiners and moderators, oral as well as written, if any;

5. Model answers, if any, given to the examiners and moderators;

13. Number of times that the Council has revised the marks of any candidate, or any class of candidates, in accordance with Regulation 39(2) of the Chartered Accountants Regulation, 1988, the criteria used for such discretion, the quantum of such revision, the authority that decides such discretion, and the number of students along with the quantum of revision affected by such revision in the last five exams held at all levels (i.e. PE-I/PE-2/PCC/CPE/Final with break-up);

4. Now, first taking up for consideration Query No.13, in the first order dated 22-2-2008 the authority declined to divulge the information by observing thus:

"The Examination Committee in terms of Regulation 39(2) has the authority to revise the marks based on the findings of the Head Examiners and incidental information in the knowledge of the Examination Committee, in its best wisdom. Since

the details sought are highly confidential in nature and there is no larger public interest warrants disclosure, the same is denied under Section 8(1)(e) of the Right to Information Act, 2005.

5. Appeal was filed against this decision. In the Appeal, reply was filed on behalf of the Respondent No.2. So far as Query No.13 is concerned, it is paragraph 13 of the reply, which is relevant. It reads as under:

"It is reiterated that the Examination Committee is not empowered to exercise its discretion in terms of the authority vested with it as per Regulation 39(2) of the Chartered Accountants Regulations, 1988 to the advantage or disadvantage of any single candidate in any of the examinations. It is further stated that there is no advantage or disadvantage given to any candidate on account of caste or religion in the Chartered Accountants Examinations."

6. It may be noted here that though the first Authority i.e. Public Information

Officer had relied on Section 8(1)(e) of the Right to Information Act to deny disclosure of information claiming that it is confidential. The Respondent No.2 did not file reply on Section 8(1)(e). The Appellate Authority's decision on query No.13 reads as under:

Query No.13: Number of times that the Council has revised the marks of any candidate, or any class of candidates, in accordance with Regulation 39(2) of the Chartered Accountants Regulation, 1988, the criteria used for such discretion the quantum of such revision, the authority that decides such discretion, and the number of students along with the quantum of revision affected by such revision in the last five exams held at all levels (i.e. PE-I/PE-2/PCC/CPE/Final with break-up)

Respondents have replied categorically that the Examination Committee was not empowered to exercise any discretion in terms of the authority vested with it as per Regulation 39(2) of the Chartered Accountants Regulations, 1988 to the advantage or disadvantage given to

any candidate on account of caste or religion in the Chartered Accountants Examinations.

Respondents have further stated "we submit our comments as under in respect of his RTI application which was replied vide our letter No.ICAI:RTIA:CPIO:186:08 dated 25<sup>th</sup> February 2008:-

- 1.It is stated that since the Institute has not earlier provided for any column relating to caste or religion or likewise in the students registration form, it was therefore regretted that providing of such information is not possible.
- 2.Since the column relating to caste was included in CPT registration form made effective from 13.9.2006, the data as available in the records of the Institute was therefore provided to the applicant.
- 3.As already stated, no advantage or disadvantage is given to any candidate in the examination based on caste or religion. Such data is therefore not called for in the examination form nor complied. Hence inability to provide such data was conveyed to the applicant.

Applicant's case is that he was entitled to receive this information which was his fundamental rights.

### Decision

I find no infirmity in the reply furnished to the appellant by the respondents. It is a categorical statement and must be accepted as such. Applicant seems to have certain presumptions and assumptions about what these replies should be. Respondents are not obliged to cater to that.

It is, therefore, held that there shall be no further disclosure of information as regards this item or query.

7. Perusal of the above quoted order shows that it has merely accepted the reply given by the Respondent No.2. This query was based on Regulation 39(2) of the Chartered Accountants Regulations 1988. Regulation 39(2) reads as under:

39(2) The Council may, in its discretion, revise the marks obtained by all candidates or a section of candidates in any particular paper or papers or in the aggregate in such manner as may be considered necessary, for maintaining the standards of pass



percentage provided in these Regulations.

8. Perusal of the above quoted Regulation shows that this Regulation confers discretion on the Council to revise marks obtained by all candidates who have appeared for the examination or section of candidates who have appeared for the examination in any particular paper or number of papers or in the aggregate in such manner as may be considered necessary by the Council for maintaining the standards of pass percentage provided in the Regulation. Thus, this Regulation vests a general power in the Council to revise the marks obtained by all candidates or a particular class of candidates as may be considered necessary for maintaining the standards of pass percentage. It is thus obvious that before exercising this power the Council as a Statutory Body

first will have to decide some principles, whether in a particular examination it is necessary for it to exercise this power or not. If it decides to exercise the power, then it will have to decide some criteria for exercising the power so that the benefits of the order can be given uniformly to everybody, who is entitled to it according to the criteria fixed by the Council. By query No.13, the Petitioner was asking the Respondents to disclose as to in which of the five last Examinations they have exercised their power under Regulation 39(2). The criteria adopted for exercising the discretion vested in it under Regulation 39(2) and also number of students who have either benefited or not benefited because of exercise of the power under Regulation 39(2) in the manner the Council decided to do it. Perusal of the order of the First Authority

shows that it has not at all understood the query made by the Petitioner. The Petitioner was not asking information as to how the marks have been revised. The Public Information Officer has also declined to divulge the information claiming that the information is highly confidential, but has relied on Section 8(1)(e) of the Right to Information Act to deny the information. Section 8(1)(e) of the Act does not deal with confidential information. Perusal of the reply filed before the Central Information Commission by the Respondent No.2, which we have quoted above, shows that they were not claiming any confidentiality in so far of this query is concerned. They were under the impression that the Petitioner wants information as to how many candidates and what category of candidates have received advantage of exercise of power under

Regulation 39(2) by the Council. That information no doubt was sought, but it was incidental to the main information sought by the Petitioner. The Petitioner basically wanted to know as to how the power under Regulation 39(2) has been exercised by the Council from time to time. Obviously, therefore, nothing can be said to be confidential about it. It is clear from what is observed above that the order of both the Authorities suffers from non-application of mind and is, therefore, liable to be set aside.

9. Now, taking up for consideration Queries Nos.3 & 5, in relation to Query No.3 in the first order, query No.3 was dealt with along with Query No.2, and it was stated "Evaluation of answer books is carried out in terms of the guidance including instructions

provided by Head Examiners appointed for each subject(s). Subsequently, a review thereof is undertaken for the purpose of moderators." By query No.3, the Petitioner was seeking disclosure of instructions issued to the examiners and moderators. It is clear from the above quoted order that no relevant reason is given in this order for denying disclosure of this information. In the reply that was filed, it is paragraph 3 & 4 which are relevant. They read as under:

3. The procedure involved in various examination activities are based on experience gained over several decades and have proved to be in line with the purpose of maintaining sanctity and integrity of the examination befitting a professional examination. Revealing the step wise process of examination activity of transit of answer book from the examination centre to the Institute or vice versa can not be made available to any one not involved in the examination process and certainly not to a candidate.

4. For reasons stated above, making available the copies of instructions issued to the examiners for the purpose of evaluation of answer books is not considered appropriate to a candidate.

10. It is clear that so far as paragraph 3 is concerned, it deals with query No.2. So far query No.3 is concerned, only thing stated is "it is not considered appropriate to disclose the information." Neither any confidentiality is claimed nor any intellectual property right is claimed in relation thereto. The decision of the Central Information Commission on query No.3 reads as under:

3.Query No.3: Instructions issued to the examiners and moderators, oral as well as written, if any.

Respondents have declined to disclose this information on the ground that such disclosure would compromise the inherent confidentiality of the examination process and render it dysfunctional.

Appellant has stated that he would with to have certified copies of the actual instructions issued to the examiners and moderators for correction of answer-sheets for the final exams held in November, 2007 for all papers including the printed version of any oral instructions issued to such examiners and moderators.

Decision:

This request of the appellant cannot be complied with without seriously and perhaps irretrievably compromising the entire examination process. An instruction issued by a public authority- in this case the examination conducting authority- to its examiners is strictly confidential. There is an implied contract of trust between the examiners and the examination-conducting public authority. It would be inappropriate to disclose this information. This item of information too, like the previous one, attracts Section 8(1)(d) being the intellectual property of the public authority having being developed through careful empirical and intellectual study and analysis over the years. I, therefore, hold that this item of query attracts exemption under Section 8(1)(e) as well as Section 8(1)(d) of the RTI Act.

11. Perusal of the above quoted order of

the Central Information Commission shows that, according to Central Information Commission the Respondent No.2 has claimed that this information is confidential. The Appellate Authority has relied on Section 8(1)((d) to claim that it involves intellectual property right of the public authority. That was never the claim of the Respondent No.2. In our opinion, the order of the Appellate Authority on query No.3 also suffers from non-application of mind. That the information is confidential, therefore, unless the Petitioner shows that its disclosure is in public interest it cannot be divulged, was never the case of the Respondent No.2, as was tried to be argued before us. In our opinion, therefore, the order made in relation to query No.3 has to be set aside for this reason.



12. So far as Query No.5 is concerned, the Central Public Information Officer observed thus:

5. Solutions are given in confidence to examiners for the purpose of evaluation. Services of moderators are utilized in our context for paper setting.

13. In the reply that was filed before the Central Information Commission we do not find anything said about query No.5. Appellate Authority's order on query No.5 reads as under:

Query No.5. Model answers, if any, given to the examiners and moderators.

According to the respondents, "solutions" are given in confidence to examiners. Services of moderators are utilized in the context of paper-setting. They further stated that ICAI brings our "suggested answers" after every examination, for guidance and education of the students. This is a priced publication which any student can purchase from the open market.

Appellant has stated that he wished to have copies of the "model answers" issued to examiners for the final exams held in November, 2007. He wants to compare these answers with the "suggested answers" published by the Institute.

Decision:

Respondents have explained that what they provide to the examiners is "solutions" and not "model answers" as assumed by the appellant. For the aid of the students and examinees, "suggested answers" to the questions in an exam are brought out and sold in the market.

It would be wholly inappropriate to provide to the students the solutions given to the questions only for the exclusive use of the examiners and moderators. Given the confidentiality of interaction between the public authority holding the examination and the examiners, the "solutions" qualifies to be items barred by Section 8(1)(e) of the RTI Act. This item of information also attracts Section 8(1)(d) being the exclusive intellectual property of the public authority.

Respondents have rightly advised the appellant to secure the "suggested answers" to the questions from the open market, where these are

available for sale.

14. According to the Central Information Commission the solutions which have been supplied by the Board to the examiners are given in confidence and therefore, they are entitled to protection under Section 8(1)(e) of the RTI Act. Section 8(1)(e) does not protect confidential information and the claim of intellectual property has not made by the Respondent No.2 anywhere. In the reply it is suggested that the suggested answers are published and sold in open market by the Board. Therefore, there can be no confidentiality about suggested answers. It is nowhere explained what is the difference between the suggested answers and the solutions. In our opinion, the orders of both Authorities in this respect also suffer from non-application of mind and therefore they are liable to be set aside. We find that

the right given under the Right to Information Act has been dealt with by the Authorities under that Act in most casual manner without properly applying their minds to the material on record. In our opinion, therefore, information sought against Queries Nos.3, 5 & 13 could not have been denied by the Authorities to the Petitioner. The principal defence of the Respondent No.2 is that the information is confidential. Till the result of the examination is declared, the information sought by the Petitioner has to be treated as confidential, but once the result is declared, in our opinion, that information cannot be treated as confidential. We were not shown anything which would even indicate that it is necessary to keep the information in relation to the examination which is over and the result is also declared as confidential.

15. In the result, therefore, the orders made by both the Authorities below in relation to Queries Nos.3, 5 & 13 are set aside. The Respondent No.2 is directed to supply to the Petitioner information claimed by Queries Nos.3, 5 & 13. Rule made absolute accordingly. No order as to costs. Respondent No.2 is granted eight weeks time to disclose the above information.

(D.K.Deshmukh, J.)

(N.D.Deshpande, J.)